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2 United States Attorney

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NORTHERN DISTRICT OF CALIFORNIA

5 ~~SEALED~~  
6 ~~BY COURT ORDER~~

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11  
12 UNITED STATES OF AMERICA,

13 Plaintiff,

15 v.

17 TIMOTHY J. GANLEY,

18 Defendant.

CR: 02 - 0007  
No.

14 VIOLATION: Insider Trading - 15  
U.S.C. § 78j(b), 15 U.S.C. § 78ff(a), 17  
CFR 240.10b-5

16 SAN FRANCISCO VENUE

19  
20 INDICTMENT

21 The Grand Jury charges:

22 I. BACKGROUND

23 At all times relevant to this Indictment:

24 1. Critical Path, Inc. ("Critical Path" or the "Company") was a high-tech  
25 software and services company, incorporated in California and headquartered in San  
26 Francisco, California. Critical Path was founded in 1997 with a business plan that called  
27 for it to "handle the world's email" on an outsourced basis. Critical Path went public in  
28 1999, and its common stock was publicly traded under the symbol "CPTH" on the

INDICTMENT

1 nationwide automated quotation system ("NASDAQ") operated by the National  
2 Association of Securities Dealers.

3 2. The defendant TIMOTHY J. GANLEY was Vice President of Strategic  
4 Sales at Critical Path.

## 5 II. RELEVANT LEGAL AND ECONOMIC PRINCIPLES

6 3. The federal securities laws are intended to ensure honest markets and to  
7 promote investor confidence. Investors have a legitimate expectation that the prices of  
8 actively traded securities reflect publicly available information about the companies that  
9 issue those securities.

10 4. Insider trading undermines investor confidence in the integrity of the  
11 securities markets. Insider trading occurs when corporate insiders, such as directors,  
12 officers, or employees, trade company securities on the basis of material nonpublic  
13 information.

14 5. Securities Exchange Act Rule 10b-5 prohibits insider trading.

## 15 III. CRITICAL PATH'S INSIDER-TRADING POLICY

16 6. As a publicly-traded company, Critical Path adopted an insider-trading  
17 policy that prohibited trading in company securities by corporate insiders while in  
18 possession of material nonpublic information.

19 7. Critical Path's insider-trading policy defined material information as any  
20 information that a reasonable investor would consider important in a decision to buy, hold  
21 or sell stock, and any information that could reasonably affect the price of the stock.

22 8. In addition to the general prohibition against trading while in possession of  
23 material nonpublic information, Critical Path's insider-trading policy included further  
24 trading restrictions directed specifically toward particularly high-level insiders. The  
25 policy required high-level insiders to obtain approval before executing any Critical Path  
26 stock trades. The policy also required high-level insiders to restrict their trading to a  
27 defined period of time known as a trading window.

1           9.     When the trading window was open, high-level insiders could trade Critical  
2 Path stock if they were not in possession of material nonpublic information and if they  
3 obtained preapproval for their trade. When the trading window was closed, high-level  
4 insiders were flatly prohibited from trading Critical Path stock.

5           10.    As Vice President of Strategic Sales at Critical Path, the defendant was  
6 subject to Critical Path's insider-trading policy, and he was a high-level insider subject to  
7 the trading window and the requirement of trading preapproval.

8           11.    On January 11, 2001, the defendant's trading window at Critical Path was  
9 closed, meaning that the defendant was prohibited by Critical Path's insider-trading  
10 policy from buying or selling Critical Path stock.

11                   IV. THE DEFENDANT'S POSSESSION AND USE  
12                   OF MATERIAL NONPUBLIC INFORMATION

13           12.    On or about October 19, 2000, Critical Path publicly announced its third-  
14 quarter financial results and made predictions about its future financial performance.  
15 Specifically, Critical Path's Chief Executive Officer DOUGLAS T. HICKEY predicted  
16 that Critical Path would earn revenues of \$54 to \$56 million during the fourth quarter of  
17 2000, and that Critical Path would become profitable for the first time ever during that  
18 quarter.

19           13.    On or about November 2, 2000, Critical Path reaffirmed these predictions  
20 of fourth-quarter revenues and profitability. In a Company press release, CEO HICKEY  
21 was quoted as follows: "The fourth quarter of 2000 is a pivotal one for Critical Path, one  
22 in which we join an elite group of profitable new economy companies." The press release  
23 predicted fourth-quarter revenues of \$54 to \$56 million, and fourth-quarter earnings of  
24 \$0.01 per share.

25           14.    As the fourth quarter drew to a close, the Company was far short of its  
26 publicly-announced goals for revenues and profitability.

27           15.    On or about December 28, 2000, the defendant was approached by his  
28 supervisors at Critical Path and instructed to "call in favors" and "obtain back pocket

1 deals" for the fourth quarter. The defendant directed a salesperson reporting to him to  
2 execute a bogus software-licensing agreement for \$2 million with a company known as  
3 Bestseats. Bestseats did not need and could not pay for \$2 million of Critical Path  
4 software. Bestseats was secretly assured that it would never have to pay for the software  
5 that it was purporting to buy from Critical Path. The defendant knew that executing a  
6 software-licensing agreement with Bestseats would allow Critical Path to report fourth-  
7 quarter revenues that had not, in fact, been earned.

8 16. The defendant was also aware that, in addition to reporting false revenues,  
9 Critical Path was also fraudulently underreporting its quarterly expenses in an attempt to  
10 meet its publicly-stated goal of profitability.

11 17. By January 11, 2001, the defendant knew that, despite the fraudulent  
12 inflation of revenues and underreporting of expenses, Critical Path could not meet its  
13 publicly-stated financial goals. He believed that the price of Critical Path stock would  
14 fall if it was disclosed that the Company had failed to meet its goals and had engaged in  
15 fraud.

#### 16 V. THE DEFENDANT'S INSIDER TRADING

17 18. On or about January 11, 2001, the defendant sold 1300 shares of Critical  
18 Path stock, at an average sales price of approximately \$24.50 per share, obtaining gross  
19 proceeds of \$31,881.25.

20 19. The defendant made this sale on the basis of the material nonpublic  
21 information that Critical Path could not meet its predicted financial results and had  
22 engaged in fraud.

1 COUNT ONE: 15 U.S.C. § 78j(b), 15 U.S.C. § 78ff(a), 17 CFR 240.10b-5 (Insider  
2 Trading)

3 20. Paragraphs 1 through 19 are realleged as if fully set forth here.

4 21. On or about January 11, 2001, in the Northern District of California, the  
5 defendant

6 TIMOTHY J. GANLEY

7 did willfully, directly and indirectly, by the use of means and instrumentalities of  
8 interstate commerce and of the facilities of a national securities exchange, use and employ  
9 manipulative devices and contrivances in connection with the purchase and sale of  
10 securities, namely, the common stock of Critical Path, in contravention of the rules and  
11 regulations prescribed by the Securities and Exchange Commission, namely, Securities  
12 Exchange Act Rule 10b-5, by (a) employing a device, scheme, and artifice to defraud, (b)  
13 omitting to state material facts necessary to make statements made, in light of the  
14 circumstances under which they were made, not misleading, and (c) engaging in acts,  
15 practices, and courses of dealing which would and did operate as a fraud and deceit.

16 22. Specifically, on or about January 11, 2001, on the basis of material  
17 nonpublic information regarding the financial performance and fraud at Critical Path, the  
18 defendant sold 1300 shares of Critical Path stock, at an average sales price of  
19 approximately \$24.50 per share, obtaining gross proceeds of \$31,881.25, in breach of his  
20 fiduciary duty not to trade in Critical Path stock while in possession of material nonpublic  
21 information regarding Critical Path.

22 All in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and  
23 Title 17, Code of Federal Regulations, Section 240.10b-5.


24  
25 DATED: \_\_\_\_\_


A TRUE BILL.

26  
27 \_\_\_\_\_  
28 FOREPERSON

INDICTMENT

1 DAVID W. SHAPIRO  
2 United States Attorney

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4 LESLIE R. CALDWELL  
5 Chief, Criminal Division

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7 (Approved as to form:   
8 AUSA Anderson  
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